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In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

vs.

BYRON GIZONI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

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BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon or about the navigable waters of the United States. They work as carpenters, shipwrights, piledrivers, divers, dive tenders, riggers, and marine platform builders. They construct and repair

the piers, wharves, dry docks, cargo terminals, building ways, marine railways, and other adjoining areas customarily used by the nation to load, unload, repair, build, and break vessels. They also work on rivers, in harbors, and upon the high seas above the outer continental shelf aboard vessels owned or operated by their employers. Their work is "inherently hazardous", and involves "the dangers commonly associated with maritime and construction work."[1] This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")[2] and the Jones Act.[3] We respectfully submit that this status gives them an abiding interest in the question for review.

SUMMARY OF ARGUMENT

This case comes to court in the wake of *McDermott International, Inc. v. Wilander*[4], and steers us back towards the rocks and shoals of admiralty. In short, we're standing into "occupied waters" long "dominated by federal statute".[5] Petitioner Southwest Marine, Inc. ("Southwest") and its *amici* surge through those statutes under a

[1] 42 Fed.Reg. 27650, 37651 (July 22, 1977).

[2] *E.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

[3] *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

[4] ___ U.S. ___, 111 U.S. 807 (1991).

[5] *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 327 (1990).

full head of steam, and ask the Court to answer our central issue summarily. This *amicus* would urge the parties to slow down and navigate a bit more carefully. "The precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history."[6] As *Wilander* noted, the channel is confusing, conflicting, and filled with false starts.[7] Fortunately, the question at hand is a narrow one.

The Supreme Court granted *certiorari* herein only to determine whether employees from occupations specifically covered by the LHWCA can still go to a jury over their status as Jones Act seamen. In order to keep that question off the rocks, we need only steer past petitioner's siren-song suggestion that it can always be answered "as a matter of law".[8] This *amicus* respectfully submits that the issue of "who is a 'seaman' is better characterized as a mixed question of law and fact."[9] And that's the point where we depart from Southwest and its *amici*.

We all begin our voyage with the inarguable proposition that the Jones Act and the LHWCA are "a pair of mutually exclusive remedial statutes".[10] It follows perforce that once the District Court is satisfied from undisputed evidence that the plaintiff can only be a named beneficiary of the LHWCA, he or she is no longer entitled

[6] *U.S. v. Evans*, 195 U.S. 361, 365 (1906).

[7] *Wilander, supra*, 111 S.Ct. at 814-816.

[8] *E.g.*, Brief for the Petitioner, 42.

[9] *Wilander*, at 818.

[10] *Id.*, at 817.

to a Jones Act jury trial. But it does *not* follow that the District Court must summarily preempt a Jones Act jury trial merely because "the plaintiff is *arguably* covered by the LHWCA".[11]

Petitioner and its *amici* argue that the District Courts should defer their factfinding powers to an administrative agency, and dismiss Jones Act complaints as a matter of law, whenever the plaintiffs have accepted voluntary LHWCA compensation. Whether or not this would ultimately produce the many social and judicial economies which the opening briefs vouchsafe, it will certainly affront a long line of established authority, and perhaps even abdicate the courts' admiralty powers.

The UBCJA therefore takes issue with the assertion that a vessel-based maritime worker like Byron Gizoni is automatically barred from prosecuting a Jones Act claim merely because he might be covered under the LHWCA. We respectfully submit that the inquiry into a plaintiff's vessel-based employment status is "fact-specific".[12] Absent a prior administrative determination that the plaintiff was injured in an occupation specifically covered by the Longshore Act, and collaterally estopped from asserting standing as "a member of a crew", the question of whether his or her Jones Act status should be submitted to a jury depends, like all "fact-specific" inquiries, on whether reasonable people could differ over the outcome.[13] It is not enough that the plaintiff has accepted, or

[11] Brief for the Petitioner, 44.

[12] *Wilander, supra,* 111 S.Ct. at 818.

[13] *Id.*

even applied for, compensation benefits, or that he or she is "arguably covered by the LHWCA". That is exactly the type of argument which only a jury can decide. We therefore respectfully urge the Supreme Court to affirm the decision below.

ARGUMENT

I.

THE QUESTION FOR REVIEW IS VERY NARROW, AND DOES NOT CALL FOR ANOTHER RECONSIDERATION OF THE TEST FOR JONES ACT STATUS.

Although this Court's "power to decide is not limited by the precise terms of the question presented"[14], its rules are very specific: "We do not normally address any issues other than those fairly comprised within the questions presented by the petition for *certiorari* and any cross petitions."[15] As a consequence, "the brief may not raise additional questions or change the substance of the questions already presented in those documents."[16]

Southwest's petition for *certiorari* set forth six questions, but the writ of *certiorari* was limited to Question 3:

> ***"Are employees who are in occupations specifically covered by the Longshore Act nonetheless***

[14] *Procunier v. Navarette,* 434 U.S. 535, 559 n. 6 (1978).

[15] *Lake Country Estates, Inc. v. Tahoe Reg. Plan.,* 440 U.S. 391, 398 (1979).

[16] United States Supreme Court Rule 24.1(a).

entitled to a jury trial to determine their status as Jones Act seamen?"

This is a very narrow question. First of all, as even Southwest points out, "[t]his case does *not* involve the more general 'harbor worker' category of 'maritime employee', but rather only the specific occupation of 'ship repairman'."[17] According to section 2(3), the LHWCA specifically covers "any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker."[18] But coverage "is not limited to the occupations specifically mentioned in Section 2(3)".[19] Those trades are "only part of the larger group of activities that make up 'maritime employment' ".[20] After years of confusion, it is now clear that the LHWCA reaches virtually everyone who is regularly employed and ultimately injured upon actual navigable waters.[21] Needless to say, this embraces a wide variety of occupations. As Professors Gilmore and Black explained, "the almost infinite range of the conditions of waterfront employment has been detailed in thousands of cases."[22] Happily, we need linger among those cases just long enough to note that they are *not* at issue here.

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[17] Brief for the Petitioner, 16, n. 44.

[18] 33 U.S.C. § 902(3).

[19] *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-424 (1985).

[20] *P.C. Pfeiffer v. Ford*, 444 U.S. 67, 77 n. 7 (1979). *See, also, Chesapeake & Ohio Ry. Co. v. Schwalb*, ___ U.S. ___, 110 S.Ct. 381, 384 (1989).

[21] *Director, OWCP v. Perini North River Assoc., supra*, 459 U.S. at 324.

[22] Gilmore & Black, *The Law of Admiralty* (2d ed.) 430.

The writ of *certiorari*, again, queries only whether those employees "who are in occupations specifically covered by the Longshore Act [are] nonetheless entitled to a jury trial to determine Jones Act status." It is therefore important to point out that the title "Longshore Act" is becoming more and more of a misnomer. Back in 1962, when the labor-saving changes wrought by "containerized" cargo were just beginning to sweep the industry, the Maritime Administration could still count over 70,000 American longshoremen.[23] By 1989, however, that number had dwindled to 29,339.[24] Shipyard work is declining apace. Barely a decade ago, American shipyards employed 94,925 production workers.[25] According to the latest figures there are only 62,328 left.[26] In short, the LHWCA's named beneficiaries are rapidly becoming an endangered species. Yet the number of cases compensated under the Act has been growing over the last several years.[27] The LHWCA's center of gravity is clearly shifting. The UBCJA merely wishes to emphasize that the dwindling interests of the Act's named beneficiaries do not necessarily represent those of "the larger group of

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[23] *The Annual Report of the Maritime Administration for Fiscal Year 1962* (U.S. Dept. of Trans. 1963) 19.

[24] *The Annual Report of the Maritime Administration for Fiscal Year 1989* (U.S. Dept. of Trans. 1990) 46.

[25] *The Annual Report of the Maritime Administration for Fiscal Year 1981* (U.S. Dept. of Trans. 1982) 45.

[26] *Id.*

[27] "Annual Report on Administration of the Act During Fiscal Year 1987: Submitted to Congress 1989" (U.S. Dept. of Labor, 1989) 27.

activities that make up 'maritime employment' ".[28] We therefore respectfully urge the Court to limit its inquiries to the question at hand lest the dwindling tail of the maritime industry wag what may be becoming a whole new dog.[29]

Refusing to confine themselves to that question, Southwest and its *amici* doggedly ask another: "What is the proper test for seaman's status pursuant to the Jones Act and general maritime law."[30] But this question was answered in *Wilander*. Southwest's petition originally posed it at a time when *Wilander* had not yet been decided. But the writ of *certiorari* herein was handed down in *Wilander*'s wake, and eschewed Southwest's mooted inquiry. In short, the opening briefs should not have addressed the seaman status question,[31] and the Court need not consider it.[32]

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[28] *P.C. Pfeiffer v. Ford, supra,* 444 U.S. at 77 n. 7.

[29] As Southwest points out, Congress codified one of the crucial distinctions between shipyard workers and all other maritime trades in 1984 when it amended Section 5(b) of the Act solely to prohibit shipyard workers from suing their employers as "vessel owners" under the "dual capacity" theory outlined in *Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. 523, 528 (1983). *See* Brief for the Petitioner, 37-38. Workers "employed to provide ship building, repairing, or breaking services" are the only maritime employees who suffer that prohibition. 33 U.S.C. § 905(b).

[30] *See, e.g.,* Brief of *Amicus Curiae* Shipbuilders Council of America in Support of Petitioner, 13-20.

[31] United States Supreme Court Rule 24.1(a).

[32] *Lake Country Estates, Inc. v. Tahoe Reg. Plan., supra,* 440 U.S. at 398.

As *Wilander* explained:

> "The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. [Citation] In this regard, we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."[33]

This rule must now be allowed to percolate down through the lower courts where it can clarify and elaborate over time.[34] After steeping themselves in the subject for more than seventy-six years[35], those courts have already made it clear that a seaman must have a more or less permanent connection with an operating vessel or a

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[33] *Wilander, supra,* 111 S.Ct. at 817.

[34] *Id.,* 111 S.Ct. at 816 ["Following *Butler* [*v. Whiteman,* 356 U.S. 271 (1958) [*per curiam*]], we accepted no more of these cases, relegating to the lower courts the task of making some sense of the confusion left in our wake."]; *see, also, Yoash v. McLean Contracting Co.,* ___ U.S. ___, 111 S.Ct. 1068 (1991) [vacating judgment dismissing piledriver's Jones Act suit as a matter of law, and remanding the case to the Court of Appeal "for further consideration in light of *McDermott International, Inc. v. Wilander,* [*supra*]."].

[35] The Jones Act was passed on March 4, 1915. 38 Stats. 1185.

fleet.[36] There is no cause to re-examine that rule in this case.

Though it may sound strict and unbending, "the word 'permanent' has never been assigned a literal interpretation under the Jones Act, and should not be given a 'wooden application', but, rather, is to be used as an analytical starting point instead of a self-executing formula."[37] Petitioner and its *amicus*, the Shipbuilders Council of America, nonetheless urge the Court to board up seaman status behind a self-executing requirement that the plaintiff "normally sleep on the ship."[38] This suggestion offends the letter and logic of the law.

The Jones Act is a "humanitarian statute" which has always been interpreted liberally and with an eye towards enlarging its scope.[39] The assertion that its reach should now be confined to those few seafarers who still live aboard their vessels will give it a narrower ambit than most small town ordinances. Even a quarter-century ago, when the American merchant marine was still gear-

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[36] *E.g., Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1986); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243-246 (5th Cir. 1983), *cert. den.*, 464 U.S. 1069 (1984); *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981).

[37] *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir. 1981).

[38] Brief of *Amicus Curiae* Shipbuilders Council of America, 17.

[39] *E.g., Cox v. Roth*, 348 U.S. 207, 209 (1954).

ing up for Vietnam, it boasted no more than 45,650 "seafaring shipboard jobs."[40] According to the most recent figures, that number is down to 14,268.[41] Congress never intended to restrict the protection of the Jones Act to so small a circle. And so the courts have repeatedly held.

Over the years, this Court has either affirmed Jones Act status or preserved it for the jury in a long list of "commuter seamen" cases involving ferry hands[42], dredge hands[43], tugboat operators[44], oil rig day laborers[45] wharfside handymen[46], barge boatmen[47], and maritime pile drivers.[48] In retrospect, these decisions make it clear that the distinction between land-based and sea-based employment turns not on where the plaintiffs sleep, but on where they work. According to *Wilander*, "[a]ll those who work at sea in the service of a ship face those particular perils to which the protections of maritime law,

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[40] *The Annual Report of the Maritime Administration for Fiscal Year 1962, supra*, 19.

[41] *The Annual Report of the Maritime Administration for the Fiscal Year 1989, supra*, 46.

[42] *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1979). *See, also, Helena Glendale Ferry Co. v. Walling*, 132 F.2d 616 (8th Cir. 1942).

[43] *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957).

[44] *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956).

[45] *Gianfala v. Texas Co.*, 350 U.S. 879 (1956).

[46] *Butler v. Whiteman, supra.*

[47] *Norton v. Warner Co.*, 321 U.S. 565 (1944).

[48] *Grimes v. Raymond Concrete Pile Co., supra; Yoash v. McLean Contracting Co., supra.*

statutory as well as decisional, is directed."[49] Seizing on this language, Southwest and its *amici* seem to suggest that workers cannot be truly "sea-based" unless they live aboard a seagoing vessel. As the admiralty answered back in 1896:

> "And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.' "[50]

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[49] *Wilander, supra*, 111 S.Ct. at 817.

[50] *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896). The *Saylor* case is not only onomatopoeic but peculiarly apt. It comprised a libel *in rem* against the owners of an inland dredge. Since the vessel was a small one, the libelants had to compete for priority. Mr. S.S. Saylor was a dredge hand seeking wages and a "seaman's priority". 77 F. at 476. A.J. Taylor & Bros. were towboat operators who disputed Saylor's standing as a seaman. *Id.* Reasoning exactly like Southwest and its *amici*, they urged the Court to dismiss Saylor's claim. The District Court granted their motion. The Court of Appeal reversed. Its decision echoes down the years in *Offshore Co. v. Robison* (266 F.2d 769 (5th Cir. 1959)) and *Wilander*.

We likewise submit that seamen don that legal raiment whenever they board their vessel, no matter where they bunk.[51]

The permanent connection requirement was designed to distinguish vessel-based workers from those whose associations with a ship are sporadic, transitory, fortuitous, or only incidental to a shore-based employment.[52] Courts from every level of decision have been drawing that distinction for decades.[53] There is no reason to disturb those decisions here. The seaman status question was answered in *Wilander*, and eschewed by the writ of *certiorari*. It lies outside the issue for review.

II.

EVEN THOUGH THE JONES ACT AND THE LONGSHORE ACT ARE MUTUALLY EXCLUSIVE, THEY ARE INEVITABLY CONNECTED BY A "ZONE OF UNCERTAINTY".

As we noted at the outset, *Wilander* leaves no doubt that the Jones Act and the LHWCA are "a pair of

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[51] *Ardoin v. J. Ray McDermott, supra*, 641 F.2d at 282 ["It is now clear that merely sleeping and eating aboard a support vessel does not make one a seaman if one does not otherwise meet the *McKie/Robison* criteria. [Citation] Nor does a failure to do so deprive one of seaman's status if these criteria are otherwise met."].

[52] *E.g., Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479 (5th Cir. 1976); *Brown v. ITT Rayonier*, 497 F.2d 234, 237-238 (5th Cir. 1974).

[53] *See, gen.*, 2 Norris, *The Law of Seamen* (4th ed.) 341 *et seq.*; Gilmore & Black, *supra*, 328 *et seq.*; Engerrand & Bale, "Seaman Status Reconsidered", 24 S.Tex.L.J. 431 (1983).

mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees."[54] Launching their arguments from that firm ground, Southwest and its *amici* quickly jump in over their heads. They urge the Court to adopt what they have christened the "*Pizzitolo/ Wilander* rule"[55] – after the Fifth Circuit's decision in *Pizzitolo v. Electro-Coal Transfer Corp.*[56]

Pizzitolo was a Jones Act case brought by a waterfront electrician who spent "75% of his time maintaining and repairing . . . shore based machinery."[57] Following a full and fair jury trial, the District Court granted the defendant/employer a *j.n.o.v.* because the plaintiff was shown to have been "engaged in one of the occupations expressly covered by the LHWCA".[58] After reviewing all the evidence, the Fifth Circuit Court of Appeal concluded that the plaintiff was "a harbor-bound ship repairman" who was "unqualifiedly covered by the LHWCA", and "not 'a member of a crew' and thus not a Jones Act seaman."[59] This holding is perfectly consistent with the time-honored rule that a District Court may deny seaman's status as a matter of law only where there is no reasonable evidence to support a jury finding in plaintiff's favor.[60] Surging past that rule, Southwest and its

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[54] *Wilander, supra,* 111 S.Ct. at 817.

[55] *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc. *et al.*, 3.

[56] 812 F.2d 977 (5th Cir. 1987).

[57] *Id.*, 812 F.2d at 979.

[58] *Id.*, 812 F.2d at 982.

[59] *Id.*, 812 F.2d at 982-983.

[60] *E.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1346 (5th Cir. 1980); *Owens v. Diamond M Drilling Co.*, 487 F.2d 74, 76

(Continued on following page)

amici leap to the conclusion that *Pizzitolo* signals the Fifth Circuit's readiness to dismiss Jones Act cases as a matter of law whenever "the plaintiff is *arguably* covered by the LHWCA".[61] But as that circuit meticulously explained in *Simms v. Valley Line Co.*:

> "Well recognized are the difficulties faced by the injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all *but* seamen, and the Jones Act, which applies *only* to seamen), but which seem in practice to frequently overlap each other's borders;
>
> Thus, despite our continued insistence that a Jones Act 'seaman' and a 'crew member' excluded from the Longshoremen's Act are one in the same (in other words that the statutes are

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(Continued from previous page)

(5th Cir. 1973). *See, also, Leonard v. Dixie Well Service and Supply, Inc.*, 838 F.2d 291, 296 (5th Cir. 1987) [reversing summary judgment for the employer in a Jones Act case and distinguishing *Pizzitolo* on grounds that, under the indisputable evidence concerning the plaintiff's status there, "it was not surprising that he was eligible for LHWCA but not for Jones Act coverage."]; *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988) [reversing and remanding summary judgment granted under *Pizzitolo* for factual determination as to whether plaintiff spent majority of his time as seaman or Longshore worker]; *Chauvin v. Sanford Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989) [same].

[61] Brief for the Petitioner, 44; *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc., *et al.*, 15 *et seq.*

> mutually exclusive) we recognize that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts."[62]

Southwest and its *amici* urge the Court to sever that Gordian connection with the blunt sword of summary determination.[63] But, as we shall see later, such a stroke would eventually come up against the adamant purpose beneath both statutes.[64]

III.

THE MERE FACT THAT VESSEL-BASED WORKERS ACCEPT, OR APPLY FOR, LHWCA BENEFITS DOES NOT SUMMARILY CUT THEM OFF FROM THEIR ORDINARY JONES ACT RIGHTS.

Southwest's assertion that a maritime worker's status can be determined summarily whenever he or she is *"arguably* covered by the LHWCA"[65] misconceives the whole purpose of that Act. The history of the LHWCA has been told well and often elsewhere.[66] It is enough to note that it was passed in 1927 to stop the gap left by the states' constitutional inability to compensate industrial

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[62] 709 F.2d 409, 411 (5th Cir. 1983).

[63] *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc., *et al.*, 23.

[64] Continues *Simms*, "[t]he recognition by this circuit that the Jones Act and the Longshoreman's [sic] Act each requires a 'liberal application in favor of claimant to effect its purposes,' has further contributed to the zone of uncertainty and to the dilemma of injured workers within it." *Id.*

[65] Brief for the Petitioner, 44.

[66] *See, e.g., Northeast Marine Terminals Co., Inc. v. Caputo,* 432 U.S. 249, 256-273 (1977); Gilmore & Black, *supra*, 404-455; Baer, *Admiralty Law of the Supreme Court* (3d ed.) 132-300.

injuries on navigable waters.[67] Congress expanded the Act's umbrella shoreward in 1972 in order to establish "a 'uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.' "[68] The '72 Amendments "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured."[69] As Justice Kennedy presaged back in 1978, "neither test is precise, and cases will often arise which present questions of coverage that are difficult to resolve."[70] This Court attempted to resolve some of those difficulties in *Director, OWCP v. Perini North River Assoc. ("Churchill").*[71]

Churchill explained that there was "no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon navigable waters in the course of their employment . . . "[72] It therefore held "that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in Section 2(3), and is covered under the LHWCA, providing, of course, that he is the

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[67] *United Marine Mut. Indem. Ass'n. v. Donovan,* 701 F.2d 791, 792 (9th Cir. 1983).

[68] *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* 432 U.S. at 272, *quoting* S. Rep. 13; H.R. Rep. 11, U.S. Code Cong. & Admin News 1972, p. 4708.

[69] *Caputo, supra,* 432 U.S. at 264-265.

[70] *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 140 (9th Cir. 1978).

[71] *Supra.*

[72] *Id.,* 459 U.S. at 323.

employee of a statutory 'employer,' and is not excluded by any other provision of the Act."[73] The provision which interests us here, of course, is the crewmember exclusion in Section 2(3)(G).[74] According to *Wilander*, that exclusion "further defines Jones Act coverage".[75] It also highlights the overlapping "zone of uncertainty" which the Fifth Circuit recognized in *Simms*.[76] As can be judged from its holding, *Churchill* lies squarely within that zone.

The claimant in *Churchill* was a marine pile driver foreman (and, coincidentally, a member of the UBCJA) who had been engaged to build a New York City sewer outfall on the bottom of the Hudson River. He was "in charge of all work performed on a cargo barge used to unload caissons and other materials from the supply barges and to set caissons" on the river bottom.[77] Like the "seaman" pile driver in *Grimes v. Raymond Concrete Pile Co.*[78], the claimant in *Churchill* was more or less permanently connected with a special-purpose construction vessel in a capacity which contributed to her mission. Though it appears nowhere in the opinion itself, his job title was actually "barge captain". As even Southwest admits, he might well have been excluded as a "seaman" and "a member of a crew" had his employer only raised

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[73] *Id.*, 459 U.S. at 324.

[74] 33 U.S.C. § 902(3)(G) ["The term 'employee' . . . does not include . . . a master or member of a crew of any vessel;"].

[75] *Id.*, 111 S.Ct. at 814.

[76] *Supra*, 709 F.2d at 411.

[77] *Churchill, supra*, 459 U.S. at 300.

[78] *Supra* [vessel-based pile driver held Jones Act "seaman"].

that defense.[79] In short, he worked in the zone of uncertainty that inevitably connects the two Acts. We should consider the unusual dilemmas faced by such workers before accepting Southwest's invitation to deal with their situation summarily.

What *Simms* called "the plight of injured maritime workers employed at the border of harbor/work seaman status"[80] has been documented by a long line of cases beginning with *Reed v. The S.S. YAKA*.[81] Those cases all share the realization that "[t]here is nothing sinister about a worker who claims to be physically disabled from injuries incurred during his employment, attempting either personally or through counsel, to obtain recovery by whatever lawful remedy or remedies are available to him."[82] This is especially true in an age of congested courts and delayed litigation.[83] Without interim LHWCA

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[79] "Under the *Wilander* test, Churchill could conceivably be entitled to proceed to a jury trial to determine his status as a Jones Act seaman because his duties, at least arguably, contributed to the purpose or function of a vessel (the cargo or supply barges), and he, again arguably, had a more or less permanent connection to a vessel in navigation." Brief for the Petitioner, 24, n. 85

[80] *Simms, supra*, 709 F.2d at 411.

[81] 373 U.S. 410 (1963). *See, also, Simms, supra; Boatel, Inc. v. Delamore*, 379 F.2d 850 (5th Cir. 1967); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966); *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C.Ha. 1982); *Lewis v. Roland E. Trego & Sons*, 359 F.Supp. 1130 (D.C.Md. 1973); *Ramos v. Universal Dredging Corp.*, 15 B.R.B.S. 140 (BRB, 1982).

[82] *Boatel, supra*, 379 F.2d at 854.

[83] *See, gen., Report of the Federal Courts Study Committee* (April 2, 1990) pp. 4-10.

benefits, for example, workers injured in the zone of uncertainty might have to subsist on "maintenance and cure". That remedy dates back to a shipowner's medieval obligation to provide injured seamen with lodging, a nurse, a candle, and food[84], and can condemn 20th-century families to as little as $8.00 a day in interim benefits.[85] Worse still, maintenance and cure expires as soon as seamen reach "maximum medical cure" – whether or not they are able to return to work.[86] It is no wonder, then, that workers injured in the zone of uncertainty which connects the two Acts often seek succor under each.

It is therefore well established that "the mere acceptance of Compensation Act benefits without a formal adjudication of seaman status will not preclude subsequent Jones Act suit . . . "[87] In fact, where the evidence is enough to send the threshold seaman question to a jury, this Court has ruled that it is reversible error to permit the employer to prove that the worker accepted LHWCA benefits while waiting for trial.[88]

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[84] Gilmore & Black, *supra*, 281; 1 *Benedict on Admiralty* (7th ed.) 1-20.

[85] *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

[86] *Wood v. Diamond M Dredging Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982). *See, also, Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Farrell v. U.S.*, 336 U.S. 511 (1949).

[87] *Simms, supra*, 709 F.2d at 412.

[88] *Tipton v. Socony Mobil Oil*, 375 U.S. 34, 37 (1963). *See, also, Eichel v. New York Central R.R. Co.*, 375 U.S. 253 (1963); *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986). *See, gen.*, 2 Norris, *supra*, 360.

It is equally well established that injured workers cannot summarily cut themselves off from the Jones Act by filing an administrative application for LHWCA benefits.[89] The law in this area "tolerates no distinction between the mere availability or voluntary payment of compensation and a positive claim for it."[90] As the cases explain:

> "[N]ot to allow suit where compensation has been affirmatively sought would discourage the spontaneous initiation of payments. Under such a policy the employer who immediately and voluntarily begins compensation payments would be subject to suit; the employer who forces his employee to seek compensation would be immune from suit."[91]

In short, it was wrong of Southwest and its *amici* to suggest that the exclusive remedy provisions of the LHWCA[92] somehow estop a whole class of vessel-based workers from pursuing their potential Jones Act rights. "Rules of civil pleading allow alternative claims by the use of distinction and alternative counts, *n'importe* their inconsistency."[93] There is nothing at all inequitable about this[94] provided that uncertain workers advise the

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[89] *Simms, supra*, 709 F.2d at 411-412; *Biggs, supra*, 360 F.2d at 364.

[90] *Biggs, supra*.

[91] *Id.*

[92] 33 U.S.C. § 905(a).

[93] *Biggs, supra*, 360 F.2d at 364.

[94] *See Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2nd Cir. 1963).

Department of Labor and their employers that they intend to pursue alternative counts, so that "applicant and counsel would have been altogether candid with the agency, and the employer would be protected from duplication of payment by being advised through notice to withhold the sums paid by any judgment."[95] Thus:

> "If the plaintiff succeeds in [his subsequent Jones Act] suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies – compensation and suit – are thus made complementary. An important purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved and the injured party's opportunity to press further remedies remains unabridged."[96]

Congress effectively codified these points, together with the practical uncertainties from which they grew, in 1984 when it amended LHWCA Section 3 to establish a compensation credit for any amounts paid under the Jones Act.[97] Southwest and its *amici* close their eyes to this amendment. It demonstrates, yet again, that the border between the LHWCA and the Jones Act cannot always be drawn summarily. Where reasonable people can differ over the outcome, the question of who is or is

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[95] *Biggs, supra*, 360 F.2d at 365-366.

[96] *Id.*, 360 F.2d at 364.

[97] 33 U.S.C. § 903(e).

not a seaman must inevitably go to a jury unless the plaintiff has already been finally adjudged a named LHWCA beneficiary by a court of competent jurisdiction.

IV.

EVEN IF WE ACCEPT THAT THE DEPARTMENT OF LABOR HAS THE ADMINISTRATIVE AUTHORITY TO ENTER FINDINGS ON SEAMAN STATUS WHICH ARE COLLATERALLY CONCLUSIVE, THIS DOES NOT REQUIRE THE DISTRICT COURTS TO ABDICATE THEIR ARTICLE III POWERS IN ALL "ARGUABLE CASES".

In what is undoubtedly the "oddest" passage in its brief, Southwest argues that "Congress intended that Jones Act coverage be determined, not by a jury, but by the LHWCA."[98] Reasoning that Congress invested the Department of Labor with special powers over the seaman status question, petitioner suggests that the District Courts "should defer to the expertise of the LHWCA administrative agency" whenever the plaintiff is "arguably" covered by the compensation statute. Far from merely giving collateral estoppel effect to prior administrative judgments, Southwest would have the judiciary decline to hear a seaman's case "until the plaintiff [had] obtained a final LHWCA agency determination that he [or she] is a 'master or member of a crew,' i.e., a Jones Act 'seaman.' "[99] Though Jones Act litigation currently comprises no more than one percent of the District Court

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[98] Brief for the Petitioner, 43.

[99] *Id.*, 44.

docket[100], petitioner touts this remarkable abdication of Article III powers as a major economy. What makes this suggestion odd is that the Solicitor of Labor opposes it![101] What makes it odder still is that the decisions of the Benefits Review Board don't support it either.

The Benefits Review Board is the administrative tribunal which Congress fashioned to hear LHWCA appeals.[102] Drawing on its expertise in the field, the Benefits Review Board has always held that "[a]pplying the *Robison* test to Longshore cases would exclude large numbers of employees from Longshore coverage under the provisions of Section 2(3)."[103] As recently as last December, that agency was still interpreting the Act's crewmember exclusion under the very "aid to navigation" standard which this Court finally "jettisoned" in *Wilander*.[104] In short, the Board's decisions "do not believe that the option of proceeding under the Longshore Act, an act employing an administrative process and different adjudicatory standards than the Jones Act, should be foreclosed to those employees who would be excluded by application of the *Robison* test."[105] They have suggested, instead, that:

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[100] *Report of the Federal Court Study Committee, supra,* 62.

[101] *See* Brief of the United States as *Amicus Curiae* in Support of Respondent.

[102] 33 U.S.C. § 921(b).

[103] *Ramos v. Universal Dredging Corp., supra,* 15 B.R.B.S. at 179.

[104] *See Ryan v. Alaska Contractors, Inc.*, 24 B.R.B.S. 65, 68 (BRB, 1990).

[105] *Ramos, supra,* 15 B.R.B.S. at 144.

> "The law permits the claimant to pursue both these remedies for the same injury based on inconsistent claims as to his status at the time of injury. A seaman employee who is injured aboard his employer's vessel or on a vessel owned by a third party may recover compensation from his employer and still sue his employer and/or the third party for negligence and unseaworthiness."[106]

In other words, even the administrative agency to whom Southwest would have the courts defer insists that the question must ultimately go to a jury – at least where the injured worker's status has not yet been finally adjudicated.

"When the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered," however, "a far more formidable defense looms, that of res judicata or collateral estoppel."[107] Though *Wilander* instructs that the findings of the Department of Labor are conclusive[108], "the extent to which collateral estoppel and res judicata will be applied to a Jones Act suit following a formal Board finding of non-seaman status and an award of benefits appears to be a matter of first impression [before this Court] (and one about which the commentators suggest there is uncertainty)."[109] As Gilmore and Black summed up:

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[106] *Ryan v. McKie,* 1 B.R.B.S. 221, 225 (BRB, 1974), *citing, inter alia, Reed v. The SSYAKA, supra; Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946); and *Biggs v. Norfolk Dredging, supra.*

[107] 4 Larson, *Workmen's Compensation Law,* § 90.51, pp. 16-357 to 16-367 (1983).

[108] *Wilander, supra,* 111 S.Ct. at 818.

[109] *Simms, supra,* 709 F.2d at 412.

> "Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman. But the plaintiff who attempts to bring a Jones Act action following a compensation award in a contested proceeding may find himself barred in a court which takes res judicata and collateral estoppel seriously."[110]

Most of the cases which have declined to apply the bar did so not by eschewing the doctrine of res judicata outright, but by finding that the facts fell short of full compliance[111], either because the administrative decision was not yet final[112], or because the crewmember exclusion had not been contested.[113] There are, nonetheless, a handful of decisions which conclude outright that, because of the special policies involved, a Jones Act case cannot be barred by any administrative finding or award.[114] Happily, the Supreme Court need not pass on

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[110] Gilmore & Black, *supra*, at 435.

[111] *See, gen.*, 4 Larson, *supra*, § 90.51, at 16-357.

[112] *E.g., Simms, supra*, 709 F.2d at 413.

[113] *E.g., Boatel, Inc. v. Delamore, supra*, 379 F.2d at 854-855; *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 700-701 (5th Cir. 1963). *See, also, Bretsky v. Lehigh Valley R.R. Co.*, 156 F.2d 594, 596 (2d Cir. 1946) [declining to bar FELA claim with prior state compensation award where question of interstate commerce had not been litigated]

[114] *Biggs v. Norfolk Dredging, supra*, 360 F.2d at 365; *De Court v. Beckman Instruments, Inc.*, (1973) 32 Cal.App.3d 628, 635, 108 Cal.Rptr. 109.

this vexing question. It was not raised by the facts of this case. Southwest paid respondent Gizoni voluntary LHWCA benefits without any administrative determination that he was or was not engaged "in an occupation specifically covered by the Longshore Act" or excluded as "a member of a crew". This leaves us only with petitioner's odd notion that the federal judiciary should decline to hear a Jones Act case until "the plaintiff has obtained a final LHWCA agency determination that he is a 'master or a member of a crew' . . . " As we saw earlier, that notion wants even the support of the agency to whom Southwest would have the courts defer. Therefore, like the Solicitor General and the Solicitor of Labor before us, the UBCJA respectfully urges this Court to reject it.

CONCLUSION

As we noted at the outset, the admiralty sails in waters dominated by federal statute. Over the years, admiralty courts have charted a meticulous course between those statutes. Skirting, as it does, the overlapping humanitarian policies which are the bedrock of civil damages and workers' compensation, the course between the Jones Act and the LHWCA has been particularly well mapped. Petitioner and its *amici* want to redraw it. But as Professor Larson teaches:

> "The community has decided that injured workmen and their families shall have as a minimum the security that goes with non-fault compensation. It is not for the individual, once he is

part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his first move, perhaps fully intending to follow this with a Jones action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimal social insurance protection that he may be entitled to. If it turns out later that he is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done."[115]

To the contrary, after decades of careful consideration, the courts and commentators alike have determined that such results are in the best interest of society and the system. By urging the judiciary either to dismiss or defer all Jones Act claims which "arguably" fall under the LHWCA, Southwest and its *amici* would radically restructure that system. But if this is their goal, they

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[115] 4 Larson, *supra*, § 90.51, at 2 16-366 to 16-367.

should present it to Congress, not the courts. The UBCJA, therefore, respectfully urges the Court to affirm the decision below.

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Respectfully submitted,

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